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2004: A Year of Mixed Messages From the Court

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Predicting Supreme Court of Canada decision making can be risky business. At Osgoode Hall's Constitutional Cases conference, which was held on April 15, 2004, this presentation claimed that the Court, at present, can be described as a "play it safe" institution. That observation was tempered, a little, by the suggestion that the Court has also shown "institutional mettle" in a couple of instances. This assessment predated its blockbuster decision in *Chaoulli v. Quebec (Attorney General)*, which was released, literally, as the conference publication went to press.¹ The question is whether *Chaoulli* discredits that view of the Court.

In *Chaoulli*, the Court invalidated Quebec's prohibition on private health insurance, which was aimed at protecting the state's monopoly on health care services. While Deschamps J. provided the tie-breaking vote under Quebec's *Charter of human rights and freedoms*, the rest of the panel comprising seven judges in all faced off evenly on the question whether restricting access to private health insurance violated section 7 of the *Canadian Charter of Rights and Freedoms*.² Given the 2004 jurisprudence, which either rejected most claims under the Charter or decided them narrowly, *Chaoulli* came as a surprise. For the time being, it is unclear whether this should be regarded as an isolated decision, or understood as a sign of renewed activism. In general, the Court under Chief Justice McLachlin is cautious, and has chosen its moments of intervention under the Charter with care. Knowing the perils of doing so, this comment predicts that *Chaoulli* will not set off a wave of activism at the Court; it suggests, instead, that the decision should be seen as an exception to the current temper of risk-averse adjudication.

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¹ [2005] S.C.J. No. 33, 2005 SCC 35 (decided June 9, 2005).

² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"] While the Chief Justice and Major J., with Bastarache J. concurring, wrote that the legislation violated s. 7 of the Charter in the circumstances, Binnie and LeBel JJ. wrote a dissenting opinion, in which Fish J. concurred.

I. PLAYING IT SAFE

Before *Chaoulli*, those who advocate strong judicial enforcement of Charter entitlements must have been sorely disappointed: from the end of 2003 to the present, the Court dismissed the claim in a run of cases which includes: *R. v. Malmö-Levine*; *R. v. Caine*;³ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* (the “s. 43 Case”);⁴ *Harper v. Canada (Attorney General)*;⁵ *Re: Application under s. 83.28 of the Criminal Code*;⁶ *Hodge v. Canada (Minister of Human Resources Development)*;⁷ *Newfoundland (Treasury Board) v. N.A.P.E.*;⁸ *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*;⁹ and, in 2005, *Gosselin (Tutor of) v. Quebec (Attorney General)*.¹⁰ Offsetting those Charter losses are *R. v. Demers*, which invalidated *Criminal Code* provisions concerning those who are unfit to stand trial,¹¹ the Quebec cases on freedom of religion,¹² *Vancouver Sun (Re)*, which applied the open court principle to investigative hearings under the *Anti-terrorism Act*,¹³ and *R. v. Mann*, which placed judge-made limits on police powers of search incident to investigative detention.¹⁴

To compare, last year’s conference highlighted Charter victories on equality, in *Nova Scotia (Workers’ Compensation Board) v. Martin*¹⁵ and *Trociuk v. British Columbia (Attorney General)*;¹⁶ on the rights of the Métis in *R. v. Powley*;¹⁷ and on remedies arising from a minority language education claim, in *Doucet-Boudreau v. Nova Scotia (Minister*

³ [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571.

⁴ [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76.

⁵ [2004] S.C.J. No. 28, [2004] 1 S.C.R. 827.

⁶ [2004] S.C.J. No. 40, [2004] 2 S.C.R. 248.

⁷ [2004] S.C.J. No. 60, [2004] 3 S.C.R. 357.

⁸ [2004] S.C.J. No. 61, [2004] 3 S.C.R. 381.

⁹ [2004] S.C.J. No. 71, [2004] 3 S.C.R. 657.

¹⁰ [2005] S.C.J. No. 15, 2005 SCC 15 (March 31, 2005).

¹¹ [2004] S.C.J. No. 43, [2004] 2 S.C.R. 489.

¹² *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551, and *Congrégation des témoins de Jéhovah de St-Jérôme Lafontaine v. Lafontaine (Village)*, [2004] S.C.J. No. 45, [2004] 2 S.C.R. 650.

¹³ [2004] S.C.J. No. 41, [2004] 2 S.C.R. 332.

¹⁴ [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59.

¹⁵ [2003] S.C.J. No. 54, [2003] 2 S.C.R. 504.

¹⁶ [2003] S.C.J. No. 32, [2003] 1 S.C.R. 835.

¹⁷ [2003] S.C.J. No. 43, [2003] 2 S.C.R. 207.

of Education). Last year, *Doucet-Boudreau* was selected as 2003's most significant decision.¹⁸

How different it looks this year. In that, it is not the results alone that are significant. Early in 2004, the claim may have failed in several cases, but not without generating rich debate among members of the Court, which emerged in the form of thoughtful concurring or dissenting opinions.¹⁹ Last fall, the Court shifted to a no-nonsense style of decision-making, which, spoke in one voice and resolved Charter claims efficiently, with analytical skill and precision. The decisions which fit that description include *Hodge, N.A.P.E.*, *Auton*, *Reference re Same-Sex Marriage*,²⁰ and the *Quebec Language Education Cases*.²¹

In same ways, this is not an unwelcome development. For years, commentators grouched about the Court's practice of issuing prolix and repetitive opinions, including lengthy concurrences; these efforts were considered more an indulgence than a contribution to the jurisprudence. In such circumstances, it would be unfair to fault the Court's newfound respect for effective, economical writing. It is also difficult to criticize the judges for their record of unanimity in these cases: when members of the Court agree on points of interpretation, it has a stabilizing and legitimizing effect on the Charter jurisprudence.

At the same time, these benefits are not without other consequences, which should also be pointed out. For one, it would be unfortunate if unanimity created an impression that the issues at stake in cases like *Auton* or *N.A.P.E.*, to give two examples, were neither difficult nor important enough to prompt differences of opinion. By presenting a united front in *Hodge, N.A.P.E.*, *Auton* and the *Quebec Language Education Cases*, the Court made it seem as though the issues were not especially challenging; if lower courts or the public thought differently, the Court set matters straight in a single opinion that determined the outcome conclusively, without apparent doubt or hesitation. Unanimity

¹⁸ [2003] S.C.J. No. 63, [2003] 31 S.C.R. 3. See Cameron and Monahan, "Constitutional Cases 2003: An Overview" (2004) 24 S.C.L.R. (2d), at 2.

¹⁹ See *R. v. Malmø-Levine*, *supra*, note 3; the *Section 43 Case*, *supra*, note 4; *Harper*, *supra*, note 5, and the *Anti-terrorist* cases: the *Section 83.28 Application*, *supra*, note 6, and *Vancouver Sun*, *supra*, note 13.

²⁰ [2004] S.C.J. No. 75, [2004] 3 S.C.R. 698.

²¹ *Gosselin (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 15, 2005 SCC 15. See also *Casimir v. Quebec (Attorney General)*, [2005] S.C.J. No. 16, 2005 SCC 16; and *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, 2005 SCC 14.

also imposes constraints on the decision-making process, which can result in reasons that are narrow or mechanical in nature.²² Concurring and dissenting opinions which at times seem like a bother and a nuisance nonetheless offer a point of resistance to conformist thinking. What was missing in this period of unanimity was dialogue between the judges and, with such dialogue, any indication that members of the Court were prepared to take risks in their interpretation of the Charter. In the absence of a dynamic tension between competing visions of the Charter and the Court's mandate to enforce its entitlements, ideas can stagnate.

It should also be remembered, as a matter of context, that the Court sat as a panel of seven in many of these cases and, in addition, that it was regrouping in the fall of 2004 after the departure of Justices Iacobucci and Arbour, and arrival of new Justices Abella and Charron. That said, to the extent it appeared as though members of the Court had fallen into a habit of agreeing with each other too easily, *Chaoulli* provided a reassuring sign that healthy debate is alive at the highest Court.

II. SHOWING INSTITUTIONAL METTLE

Two cases which tested the Court's mettle in the fall of 2004 deserve further comment. First is the *Same-Sex Marriage Reference*, which posed four questions to the Court for an advisory opinion.²³ From an institutional perspective, the Court's refusal to answer one of the four is the key point of interest here. Second is *Newfoundland v. N.A.P.E.* and the appellate opinion of Marshall J.A., who challenged the Court's section 1 jurisprudence and called for reform of the *Oakes* test.²⁴ In response, the Court maintained that reforms were unnecessary but allowed limits based on budgetary considerations just the same.

It is accepted that the Court has a duty to answer reference questions, and that its discretion to withhold a response is limited to rare circumstances. That discretion has been exercised no more than a few times in recent memory, when the Court concluded that an answer

²² See, e.g., *Auton*, [2004] S.C.J. No. 71, [2004] 3 S.C.R. 657 which dealt with the constitutional entitlements of autistic children, in large part, through an analysis of comparator groups under s. 15.

²³ *Supra*, note 20.

²⁴ *Supra*, note 8.

would be institutionally awkward or inappropriate.²⁵ The Court's reference opinions have characteristically taken a broad view of whether and to what extent it is permissible for the judges to comment on issues, including those which either are not strictly legal or not strictly necessary to decide. This approach led Peter Hogg to comment that the Court has been "astonishingly liberal in the questions it elected to answer," and has not made "sufficient use of its discretion not to answer a question posed on a reference."²⁶

The federal government's reference to the Court on gay marriage initially presented three questions about its constitutional status before adding a fourth, which asked whether a requirement that marriage be limited to opposite sexes violated the Charter. As the second question already raised the issue of gay marriage under the Charter, it was unclear what value the fourth added to the reference.²⁷ After concluding that same sex marriage is consistent with the Charter, the Court refused to consider whether an opposite sex definition is unconstitutional. In its unanimous opinion the Court said it was not obligated to answer that question, for two reasons. First, as the government had announced that it would legislate gay marriage, no matter what the judges said, the Court's opinion quite obviously served no legal purpose.²⁸ Though the judges can hardly be blamed for feeling insulted and trivialized in the circumstances, the absence of a purpose which was strictly legal in nature had not deterred the Court from responding in other reference proceedings. Moreover, on that reasoning, it might have refused to answer any of the questions: the "no legal purpose" rationale could apply to the entire reference, not just the fourth question.²⁹

²⁵ See, e.g., *Reference Re Legislative Authority of the Parliament of Canada in Relation to the Upper House*, [1980] 1 S.C.R. 54 (declining to answer certain questions relating to Senate reforms).

²⁶ P. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Thomson Canada Ltd., 1997), at 228.

²⁷ Question 2 asked: "[I]s section 1 of the proposal, which extends capacity to marry to persons of the same sex, consistent with the *Canadian Charter of Rights and Freedoms*?" Question 4 then asked: "Is the opposite-sex requirement for marriage ... as established by the common law and [Quebec legislation] consistent with the *Canadian Charter of Rights and Freedoms*?" *Same-Sex Marriage Reference*, *supra*, note 20, at para. 2.

²⁸ *Id.*, at para. 65.

²⁹ There is a difference between the first three questions and the fourth: while the others addressed the constitutionality of a legislative proposal, the final question revived the constitutionality of opposite sex marriage; the Court noted that the Martin government had rejected that requirement; in the circumstances, there was no need to provide advice.

Second, the Court claimed that the government's decision not to appeal the lower court decisions on point essentially estopped it from asking the same question on a reference. More specifically, the judges found that it would be unfair to put rights which had vested in the interim at risk. In addition, answering the fourth question could put the Supreme Court's advisory opinion in conflict with decisions which had not been appealed. Put bluntly, what the Court meant was that if the federal government wanted a legal answer to a legal question, it should have appealed those decisions.

Yet the federal government was not required to appeal those decisions, and the Court is required to answer reference questions. Though the judges said they could not be influenced by "a presumed outcome" in facing the threshold question whether to address the fourth question, it is unimaginable that the Court would give inconsistent answers.³⁰ Once having found that the Charter *permits* gay marriage, it would be difficult for the judges to turn around and at the same time uphold an opposite sex requirement that effectively *prohibits* it. In other words, the answer to the fourth question was at least implicit in the way the Court responded to the second one.

It is likely that the judges resented the federal government's opportunism in foisting the responsibility for gay marriage onto the Court. This is why, a peevish response was perfectly understandable. It is also possible that the Court did not want that responsibility, and chose to protect itself from the criticism it would have attracted had it declared that conventional, heterosexual marriage is unconstitutional. Thus it found cover in the contention that an answer, which it would have been obligated to provide on appeal, could be ducked when it came before the judges in the form of a reference question.

There are other elements of the *Same-Sex Marriage Reference* which suggest that the Court did its best to discharge its duty as narrowly and unobtrusively as possible. A quick comparison between this reference and the *Secession Reference* illustrates the point.³¹ There, as well, the federal government put the Court in an awkward position by asking it three easy questions which would bolster its position vis-a-vis Quebec, in the event of yet another referendum question on separation. Nor

³⁰ *Same-Sex Marriage Reference*, *supra*, note 20, at para. 61.

³¹ *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217.

could the Court have been enthusiastic, in those circumstances, about being placed in that position. Not only did the Court answer all the questions posed, in doing so it created a theory of unwritten principles and then used it to invent a constitutional duty to negotiate, in the hypothetical circumstances of a clear referendum question resulting in a clear majority for separation. At the same time, the Court insisted in the *Secession Reference* that it had not, and would not, address political questions. Yet, in creating the duty to negotiate it managed to forge a compromise despite being required to address questions which, by legal criteria, could only have been answered in the federal government's favour.

The Court's judgment in the *Same-Sex Marriage Reference* stands in marked contrast. There is little, if anything, to note or remember in these reasons other, perhaps, than the Court's refusal to answer the fourth question. Yet the judges could have seen the reference as an opportunity to confirm and reinforce lower court opinions on gay marriage. This would have been important, not only in principle, but in practical terms as well, given grave doubts, at the time, about whether the federal government's proposed legislation would pass. Significantly, the Court chose not to take that step. That choice showed institutional mettle, in the Court's refusal to permit itself to become a pawn in the political battle over gay marriage. But it also revealed that the Court was unwilling to take the risk of being criticized for confirming what the lower courts had already found, that an opposite sex requirement is unconstitutional. That is how showing institutional mettle and playing it safe converged in the circumstances of the *Same-Sex Marriage Reference*.

Newfoundland (Treasury Board) v. N.A.P.E. also raised institutional issues which were different in nature, but equally interesting.³² The question there was whether Newfoundland was justified in deferring wage adjustments, which female employees in the health care sector were entitled to under a pay equity agreement, because of an intervening financial crisis. At first impression, *N.A.P.E.* must have looked to the Court like a no win situation: enforcing the agreement over the province's claims of fiscal duress would have invited the usual criticisms about judicial interventionism; at the same time, allowing Newfound-

³² *Supra*, note 8.

land to defer its obligations might send the message that governments can renege whenever complying with the Charter became too expensive. The challenge for the Court was to take the province's claim of financial emergency seriously without allowing the case to be seen as a contest between rights and dollars.

N.A.P.E. also placed the Court's methodology and section 1 jurisprudence in issue. Justice Marshall, of the Newfoundland Court of Appeal, attained notoriety for his "attack" on the Supreme Court for intruding into the policy domain. He proposed that a "separation of powers" principle be incorporated into the section 1 analysis to reflect and recognize the institutional deference that he, Marshall J.A., thought the Supreme Court should show the other branches of government. In particular, he spoke of the "need" to revisit the "three gateways to proportionality", and "if not to completely reframe them, at least to oil their hinges to assure they swing in harmony with the Separation of Powers."³³

Doctrinally, a further complication arose from Lamer C.J.C.'s unequivocal statement in the *Provincial Judges' Reference*, that "a measure whose *sole purpose* is financial, and which infringes *Charter* rights, can *never* be justified under s. 1."³⁴ Justice Binnie undertook the delicate task in *N.A.P.E.* of explaining why Newfoundland was allowed to defer its obligations under the pay equity agreement. In doing so, he avoided the force of Lamer C.J.C.'s "financial exception" to the concept of reasonable limits by drawing a distinction between "normal" budgetary considerations, and those which attain the dimension of a financial crisis.³⁵ In "weighing a delay in the timetable for implementing pay equity against the closing of hundreds of hospital beds," he said, the government was not engaged in an exercise whose "sole purpose" was financial, but in one that had "as much to do with social values" as with dollars.³⁶ To reinforce the point that the Court did not view it as a contest between the two, he added that "[t]he government in 1991 was not just debating rights versus dollars but rights versus hospital beds, rights

³³ [2002] N.J. No. 324, 221 D.L.R. (4th) 513, at para. 365.

³⁴ *Reference re Remuneration of Judges of the Provincial Court of P.E.I.*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3, at para. 284 (emphasis added).

³⁵ *Supra*, note 8, at para. 64. The language he employs here is reminiscent of the emergency and dimension doctrines of the peace, order and good government jurisprudence.

³⁶ *Id.*, at para. 72.

versus layoffs, rights versus jobs, rights versus education and rights versus social welfare. The requirement to reduce expenditures, and the allocation of the necessary cuts *was* undertaken to promote other values of a free and democratic society.”³⁷ As a result, the seven members panel agreed that it was reasonable to defer pay equity, in a time of “exceptional financial crisis” which called for “an exceptional response.”³⁸

The *Oakes* test and section 1 jurisprudence was flexible enough to permit an emergency exception to the general principle that budgetary considerations do not justify limits on Charter rights. That made it unnecessary to address the proposal to incorporate a “separation of powers” principle at different stages of the *Oakes* test. As to that, Binnie J. simply held that current doctrine “already provides the proper framework in which to consider what the doctrine of separation of powers requires in particular situations”, and added that Marshall J.A. had “not made out a persuasive case for its modification.”³⁹

Putting a separation of powers gloss on the *Oakes* test was unpersuasive for more than one reason. The idea of cluttering the section 1 analysis with additional steps which must be undertaken to determine reasonable limits makes little sense. At the same time, although his proposal may not have been feasible, Marshall J.A. hit a nerve when he took the Supreme Court’s section 1 jurisprudence on. In the circumstances, Binnie J. found a way to allow limits based on fiscal considerations, without retreating from the *Oakes* methodology. The Court defended that methodology and the integrity of its section 1 jurisprudence in *N.A.P.E.*, but did so without resolving the contest between dollars and rights, or addressing the institutional issues Marshall J.A. spoke of, which unavoidably arise from that contest. Though it was unrealistic to expect the Court to adopt his proposal, *N.A.P.E.*’s reliance on an “emergency exception” left the status of budgetary considerations unclear. That question has already resurfaced in cases which were heard in the fall of 2004, and are under reserve at present.⁴⁰

³⁷ *Id.*, at para. 75 (emphasis in original).

³⁸ *Id.*, at para. 97.

³⁹ *Id.*, at paras. 115 and 116.

⁴⁰ *Bodner v. Alberta*, [2002] A.J. No. 1428, 222 D.L.R. (4th) 284 (C.A.) (rejecting the government’s reasons for rejecting the commission’s recommendations on judicial remuneration); *Provincial Court Judges’ Assn. of New Brunswick v. New Brunswick (Minister of Justice)*, [2003] N.B.J. No. 321, 231 D.L.R. (4th) 38 (C.A.) (upholding the government’s reasons for rejecting the

The constitutionalization of judicial remuneration led inexorably to the question whether judges are entitled to salaries and benefits which governments say they cannot afford to pay. More to the point, the issue is whether and by what standard the courts should review the decision by governments to reject the recommendations of “independent judicial commissions.” These commissions were established because the Supreme Court said they were constitutionally required in the *Provincial Judges’ Reference*.⁴¹

It is beside the point that the decision to constitutionalize judicial remuneration was one of the Court’s least defensible interpretations of the Charter, as the commissions have been established and cannot now be undone.⁴² At the time, the Court proposed a compromise between the Charter’s requirement that judicial independence be protected by the creation of remuneration commissions, and the government’s responsibility to pay judicial salaries, benefits and pensions from the public purse. That compromise did not settle whether a commission’s recommendations will prevail, unless the government meets a relatively strict standard of justification in explaining their rejection, or whether the government should have the final word on judicial remuneration, under a deferential standard of review. The fundamental problem is that, in principle, the compromise is incoherent: if a province cannot determine remuneration without undermining the judiciary’s independence, a commission’s recommendations should be binding; if not, judicial independence will necessarily be undermined every time the government is allowed to reject its recommendations. It does not help that the rejection of any such recommendations is subject to review, which makes judges decision makers in their own or their brethren’s cause.

It is not surprising that appellate courts applied different standards of review and reached different conclusions on these issues.⁴³ In sorting it all out, the Supreme Court may be able to base its decision in each

commission’s recommendations on judicial remuneration); *Ontario Judges’ Assn. v. Ontario (Management Board)*, [2003] O.J. No. 4155, 67 O.R. (3d) 641 (C.A.) (upholding the government’s decision to reject the commission’s recommendations on judicial remuneration); and *Conférence des juges du Québec v. Québec (Attorney General)*, 2004 R.J.Q. 1450 (concluding that the government’s response to the recommendations did not meet the test of rationality).

⁴¹ [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3.

⁴² For a critique, see J. Cameron, “The Written Word and the Constitution’s Vital Unstated Assumptions” in Thibault, Pelletier and Perret, eds., *The Challenges of Constitutionalism: Essays in Honour of Gérard-A. Beaudoin* (Quebec: Les Éditions Yvon Blais Inc., 2002) 89, at 97-103.

⁴³ *Supra*, note 40.

case on the particular issues at stake in different provinces. But the larger question, which lurks nonetheless, is whether governments are entitled to reject recommendations for the remuneration of judges, for financial reasons. The dilemma there is that *N.A.P.E.* allowed an emergency exception, but otherwise confirmed that mere budgetary considerations cannot defeat Charter entitlements. Applying that principle in the judicial remuneration cases could mean that commission recommendations will be enforced against reluctant governments, when the claims of less privileged workers, such as Newfoundland's female health sector employees, were not. If the cases on judicial remuneration come out that way, the Court will be chastized for looking after its own, while allowing limits on the claims of those who are less fortunate. The Chief Justice has impeccable instincts on matters of institutional politics, and likely would not favour results that enforce benefits for members of the judiciary, but not for health sector employees.

Whether the Court showed more institutional mettle or aptitude for playing it safe in the *Same-Sex Marriage Reference* and in *N.A.P.E.* is a question of interpretation. At the least, it is apparent that this Court is acutely aware of its institutional position: the vulnerabilities as well as the strengths of that position. This awareness is a positive development, as the Court has in the past exercised its power of review in seeming disregard of the consequences of its ambitions for the Charter. This is, to some degree, the point Marshall J.A. was trying to make in *N.A.P.E.* As the 2004 jurisprudence shows, however, too much institutional caution can place a damper on the protection of rights. That is partly why *Chaoulli v. Quebec* is such a momentous decision: it is out of step with virtually all the jurisprudence of 2004 and early 2005.

III. *CHAOULLI V. QUEBEC*⁴⁴

This conference will provide in-depth analysis of *Chaoulli*'s implications, for section 7 as well as for health care and other socio-economic entitlements, in April of 2006. At this stage, this paper attempts no more than three brief comments: this first has to do with the Court itself; the second, with section 7; and the third, with the broader implications of *Chaoulli*.

⁴⁴ *Supra*, note 1.

First, the division within the Court in this case has not escaped notice. On a panel of seven judges, three members rejected the claim,⁴⁵ three granted it,⁴⁶ and the remaining judge also found the claim valid, thereby breaking the tie. In doing so, Deschamps J. chose to withhold her view of section 7 and base her decision on the *Quebec charter of human rights and freedoms*. Whether by design or not, the division is strategic, because it leaves the status of the Charter claim unresolved, thereby preserving the question of section 7's interpretation for the full Court to debate.

More of interest here is the coalition of judges who supported the section 7 claim, which includes the Chief Justice and Major J., as co-authors of that opinion, along with Bastarache J., who concurred. This grouping, and the grounds on which it found a Charter violation, are significant because of *Gosselin v. Quebec (Attorney General)*.⁴⁷ There, a majority led by McLachlin C.J.C. held that Quebec's decision to vary welfare benefits on grounds of age did not violate the Charter. The Chief Justice dismissed the claim on evidentiary grounds, and otherwise did not indicate whether she would be prepared to extend section 7 to matters falling entirely outside the administration of justice.⁴⁸ Justice Bastarache, who also joined her opinion in *Chaoulli*, was adamant in *Gosselin* that section 7 required an administration of justice context.⁴⁹ He appeared incensed, in responding to Arbour J.'s dissenting opinion there, that she would suggest to the contrary. And then he did just that by agreeing with McLachlin C.J.C. and Major J. in *Chaoulli*. In light of precedent, then, and especially *Gosselin v. Quebec*, the result in *Chaoulli* can only be regarded as a surprise.

⁴⁵ Justices Binnie, LeBel and Fish, dissenting (*per* Binnie and LeBel JJ.).

⁴⁶ Chief Justice McLachlin, and Major and Bastarache JJ. (*per* McLachlin C.J. and Major J.).

⁴⁷ [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429.

⁴⁸ She did not indicate particular sympathy for that view, but nor did she rule an expansive interpretation of s. 7 out. Her brief opinion on the s. 7 claim focused on the two key points debated by Arbour and Bastarache JJ.: the administration of justice criterion and the permissibility of imposing a positive obligation on the state under s. 7. *Id.*, at paras. 75-84.

⁴⁹ For instance, he stated that "in certain exceptional circumstances, the Court has found that s. 7 rights may include situations outside of the traditional criminal context" but in *Gosselin*, there was "no link between the harm to the appellant's security of the person and the judicial system or its administration". *Id.*, at para. 213 (dissenting opinion). He reiterated that the "strong relationship between the right and the role of the judiciary leads me to the conclusion that some relationship to the judicial system or its administration *must be engaged* before s. 7 may be applied". *Id.*, at para. 215 (emphasis added).

This leads to the second comment, which simply makes an observation about the basis of the McLachlin-Major opinion, and its Binnie-LeBel counterpart. In *Gosselin v. Quebec*, Arbour J. urged the Court, quite unsuccessfully, to expand section 7 to matters outside the administration of justice, and to bring socio-economic issues into the Charter. She explained why section 7's two clauses should be decoupled, and the guarantee of life, liberty and security of the person given independent substantive interpretation. She did not win support for that view in *Gosselin*,⁵⁰ and nor was that view adopted in *Chaoulli*. Instead, the McLachlin-Major opinion found that Quebec's prohibition on private health insurance violated section 7 because it was arbitrary.⁵¹

The use of that standard reveals further intrigue in the evolution of the section 7 jurisprudence. Earlier, the Chief Justice had written the majority opinion in the *Section 43 Case*, which applied the three-part section 7 test from *Rodriguez v. British Columbia (Attorney General)*⁵² to uphold that provision of the *Criminal Code*.⁵³ But rather than apply that test or follow the lead of Arbour J. in *Gosselin*, she and Major J. focused on the problem of arbitrariness in *Chaoulli*. In that regard, it should be noted that she and Major J. also joined the majority opinion in *R. v. Malmo-Levine*, which likewise applied the three-part test from *Rodriguez*.⁵⁴ Meanwhile, the Binnie-LeBel opinion in *Chaoulli* applied the Chief Justice's three-part test of *Rodriguez*, *Malmo-Levine* and the *Section 43 Case* and came to the conclusion that Quebec's prohibition on private health insurance did not violate section 7. The relationship between this test and the doctrine of arbitrariness is confusing, which is by way of saying that when the Court does not play it safe, it can be highly selective in applying its own doctrinal standards.

⁵⁰ Only L'Heureux Dubé J. concurred in Arbour J.'s views on s. 7 of the Charter.

⁵¹ Rather than adopt Arbour J.'s position, which would give the life, liberty and security of the person independent substantive content, the Chief Justice and Major J. applied a "traditional" s. 7 analysis and found that Quebec's prohibition on private health insurance violated the principles of fundamental justice, on the ground that it was "arbitrary" in a constitutionally unsound way. *Chaoulli*, *supra*, note 1, at paras. 126-53.

⁵² [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519.

⁵³ *Supra*, note 4. There, she held that the s. 7 jurisprudence had established that a "principle of fundamental justice must fulfill three criteria": first, it must be a legal principle; second, there must be a consensus that the principle in question is fundamental to a societal notion of justice; and third, the principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results. *Id.*, at para. 8.

⁵⁴ *Supra*, note 3.

Finally, there is the question of *Chaoulli*'s implications. This is not the time or place to offer much beyond the obvious. In the circumstances of the 3-3-1 split, the decision's implications for section 7 turn on two variables: one is what the two new judges who did not participate in *Chaoulli* think about section 7; the other is what the nature of the next claim is and whether a majority applies the guarantee's prohibition against arbitrary laws or decides, instead, that the infringement must meet the also muddy but more structured criteria of the three-part test.

IV. MIXED MESSAGES

Though the remark was not directed at her colleagues, former Supreme Court of Canada Judge Louise Arbour said, in a speech delivered in winter of 2005, that Canadian courts have been timid in certain aspects of Charter interpretation.⁵⁵ In terms of the recent jurisprudence, that assessment is partly correct and partly incorrect: with one glaring exception for *Chaoulli v. Quebec*, it is an accurate description of the Court's work in 2004 and early 2005. As this comment has shown, a Court that focuses too much attention on institutional concerns will unavoidably constrain the scope of protection for rights.

⁵⁵ Specifically, she said: "The first two decades of *Charter* litigation testify to a certain timidity — both on the part of litigants and the courts — to tackle head on the claims emerging from the right to be free from want". L. Arbour, United Nations High Commissioner for Human Rights, "Freedom From Want' — from charity to entitlement" *LaFontaine-Baldwin Lecture 2005*, at 11.